Petition

81-2041

No.

Office - Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES K. SPENCER, individually and doing business as J&M DESIGN CO., J&M DESIGN SERVICE, INC. and CHARLENE SPENCER,

Petitioners,

v.

AMERICAN CONSULTING ASSOCIATION, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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ISSUES PRESENTED FOR REVIEW

Are defendants in a civil case, who are actively defending, deprived of Due Process Rights secured to them by the Fourteenth Amendment when the courts of Ilinois refuse to permit an attack on a $350,000.00 ex parte judgment which was entered when the defendants were not in fact in default and which was entered without notice that a default or judgment would be sought?

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SUPREME COURT OF THE UNITED STATES
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JAMES K. SPENCER, individually and doing business as J & M DESIGN CO., J & M DESIGN SERVICES, INC. and CHARLENE SPENCER,

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v.

AMERICAN CONSULTING ASSOCIATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

DECISION BELOW

The Supreme Court of Illinois denied Leave to Appeal on February 7, 1982. The decision is unreported. A copy of the order is found in the Appendix at page A-1. The opinion of the Illinois Appellate Court First District is reported at 100 Ill.App.3d 917, 427 N.E.2d 570 (1st Dist. 1981) and is reproduced in the Appendix at page A-2 et. seq. The judgment order of the Circuit Court of Cook County is reproduced at Appendix Page A-24.

JURISDICTIONAL STATEMENT

The Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(3). The judgment of the Supreme Court of Illinois denying Leave to Appeal was entered February 2, 1982 at a time not recorded. This Petition for Certiorari will be timely if filed by mail on or before May 3, 1982 without extension.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution in pertinent part provides:

> "...nor shall any State deprive any person of life, liberty or property without due process of law;..."

STATEMENT OF THE CASE

On March 25, 1977 Plaintiff-Respondent filed a Complaint against Defendant-Petitioners (C2-38). After removal to Federal Court and remand to State Court, Charlene Spencer and J&M Design Services, Inc., filed a special appearance and a Motion to Object to the Courts jurisdiction (C42-89). James K. Spencer filed an appearance and an answer (C90-95). After all Defendants had thus appeared, on March 30, 1978 a hearing was to be held on the special appearance and motion objecting to jurisdiction. On that day Defendants-Petitioners' attorneys were granted leave to withdraw and other attorneys were substituted (C-115). The hearing on the special

appearance was continued to May 12, 1978 then to May 25, 1978 (C-118). On May 25, 1978, an order was entered continuing the motion to dismiss based on lack of jurisdiction and a pending motion for fees to July 24, 1978 without further notice (C-122). The Defendant-Petitioners never received actual notice that these motions would be heard on July 24, 1978. Their counsel, however, scheduled a hearing on his motion to withdraw as attorney for the Petitioners at the same time (C123-126). A notice of the motion to withdraw was sent four days prior to the hearing, to a lawyer in Texas named Dwayne Wilcox. The Petitioners were unaware that the motion objecting to jurisdiction would be heard that day.

On July 24, 1978, an order was entered which 1) allowed the attorneys for the Defendants-Respondents to withdraw; 2) denied the motion to dismiss for lack of jurisdiction; 3) gave the Defendants-Respondents 45 days within which to secure counsel and answer or otherwise plead; ordered that further notice of all proceedings in the cause be served on Dwayne Wilcox; and 5) set this matter for a status report on September 7, 1978 at 10:30 a.m. without further notice and cotinued Plaitiff's motion for fees generally (C-127). The Defendants never received a copy of this order nor did they have knowledge that it had been entered.

On September 5, 1978, two days before the scheduled hearing, the Plaintiff <u>without notice</u> to the

Defendants had an order entered continuing the status to September 22, 1978 (C-128). The Defendants who were unrepresented by counsel at this time, received no notice that they were required to take any action on September 22, 1978 (C-597). On that date, the Defendants were found to be in default for failure to appear or plead even though the Defendants had appearances on file and Defendant Spencer had an answer on file. A prove-up was ordered to be heard on November 1, 1978 (C-129). No notice of the entry of this order was served on Defendants-Petitioners or Dwayne Wilcox, as the court order of July 24, 1978 required.

The prove-up was continued from November 1, 1978 to November 15, 1978

(C-130). Subsequently the prove-up was continued over ten times (C132-164). No notice of any of these orders continuing the prove-up was ever given to Defendants-Respondents. A judgment order in the amount of $175,000.00 consequential damages and $175,000.00 punative damages was finally entered on August 31, 1979 (C673-690). On October 9, 1979 Defendant-Petitioners were served with a petition to register the August 31, 1979 judgment in the State of Texas. Defendants-Petitioners thereupon diligently sought counsel in Illinois who diligently filed a petition to vacate the judgment on October 29, 1979 (C584-602). In seeking to have the judgment vacated the petition contended that the failure to give notice of the Plaintiff's intention to seek a default

violated due process of law. Plaintiff-Respondent moved to dismiss the petition and on May 30, 1980 the petition was dismissed (610-632, 659). The Defendants filed a notice of appeal on June 11, 1980 (C664-671). The Appellate Court rendered its decision affirming the trial court's decision on September 25, 1981. The court held that a judgment is not void or subject to attack because of lack of notice or because of defective notice.

Petitioner's timely petition for Leave to Appeal was denied by the Supreme Court of Illinois on February 2, 1982 without opinion.

ARGUMENT

The Courts of Illinois ruled that a default judgment entered without notice after an appearance has been filed is not subject to attack on due process grounds. The Illinois Courts transformed Illinois' doctrine that a litigant has a duty to follow the case (e.g., City of Milford v. Illinois Commerce Commission, 34 Ill.App.3d 293, 339 N.E.2d 470 [3rd Dist. 1975]) into a requirement that leaves a party without a remedy when his opponent has ex parte motions heard and ex parte orders entered.

The Illinois Courts approval of sneak attacks in litigation and their expanded notions of what a litigant must do to protect himself from Court

approved ambush, conflicts with the due process requirements of the United States Constitution. Due process requires notice of the pendency of an action and an opportunity to be heard. To extend the due diligence requirement of a litigant, as the Illinois Courts have done in this matter, to require constant monitoring of a case for activity beyond the routine court calls, is to ignore the constitutional protections of due process and fundamental fairness.

The Illinois Appellate Court in reviewing the facts of this case stated that "on September 5, 1978, the status date was changed to September 22, 1978, without further notice." (A-2).*

*Refers to page of Appellate Court Opinion in Appendix.

What the Appellate Court failed to acknowledge was that September 5, 1978 was not a status date for this case. The status change did not occur as a result of a routine court call, but rather by the Plaintiff-Respondent's ex parte motion without notice to Defendnts-Petitioners. In moving for a resetting of the status date, the Plaintiff ignored the part of the order of July 24, 1978 which required Plaintiff to serve notices on Dwayne Wilcox. Further, the Appellate Court ignored the fact that when the ex parte hearing without notice was held on September 22, 1978, the Trial Court entered a default order for the Defendant's failure to "appear or plead," even though all Defendants at that time <u>had an appearance on file</u> and

James Spencer had also filed an answer. The Appellate Court stated that in their view, the conduct of the Plaintiff in the instant matter, "does not warrant the conclusion that the court processes were used to gain an unconscionable advantage, nor does it suggest fraud or fundamental unfairness." (A9). The order of September 5, 1978 was unfair because it was entered without any warnings or notice to Defendants-Petitioners. It was used to gain an unconscionable advantage because it permitted the Plaintiff to secretly seek a default without contest when any contested hearing would have shown that Defendants had appeared, had pleaded and were not in default.

The Illinois Courts concluded that it was improper to relax the requirement

of due diligence. Yet what the Illinois Courts really did was to expand the litigant's duty to follow his case and relax the notice requirements so that ex parte orders may be entered in violation of a litigant's due process rights. The Illinois Courts appear to be holding that the duty to follow one's own case requires a litigant who has no reason to expect any adverse action, to check the court file frequently, to see if his opponent has launched a sneak attack by having ex parte motions heard and orders entered. This Court has not considered, but should consider whether the due process clause of the Fourteenth Amendment requires a trial court to set such an ex parte judgment aside.

It is fundamental that the due process clause of the Fourteenth

Amendment to the United States Constitution requires that a Defendant receive notice of the pendency of an action and an opportunity to voice an objection. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13, 56 L.Ed.2d 30, 41 98 S.Ct. 1554 (1978); Schroeder v. New York, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279 (1967); Walker v. Hutchinson, 352 U.S. 112, 1 L.Ed.2d 178, 77 S.Ct. 200 (1956); Mullane v. Central Hanover Trust, Co., 339 U.S. 306, 314, 94 L.Ed. 865, 873, 70 S.Ct. 652 (1950). This requirement reflects one of the basic tenets upon which our democracy is founded. Summary actions are not favored in the law.

In Armstrong v. Manzo, 380 U.S. 545, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965), the United States Supreme Court,

stated that it was clear that the failure to notify a natural father of pending adoption proceedings violated the most rudimentary demands of due process.

> Many controversies have raged about the cryptic and abstract words of the Due Process clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. (citations omitted). An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted). Questions frequently arise as to the adequacy of a particular form of notice in a particular case. (citations omitted). But as to the basic requirement of notice itself there can be no doubt, where,

> as here, the result of the judical proceeding was permanently to deprive a legitimate parent of all that parenthood implies.

Id. at 550, 14 L.Ed.2d at 65-6. In the instant matter, the result of the judicial proceeding thus far has been to deprive the Defendants-Petitioners of a substantial property right. In such a situation, as in Armstrong, supra, the basic requirement of notice must be met to afford the Defendants-Petitioners due process in conformity with the United States and Illinios Constitutions.

Similarly, in Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 reh. den. 409 U.S. 902, 34 L.Ed.2d 165, 93 S.Ct. 177 (1972), the United States Supreme Court stated:

> "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be

> affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."

Id. at 80, 32 L.Ed.2d at 569. In Fuentes, the Supreme Court considered whether notice subsequent to seizure of property pursuant to a replevin statute, was sufficient to conform with due process. The Court discussed the importance of notice "at a meaningful time and in a meaningful manner." The purpose of notice prior to deprivation of property is not only to ensure fair play, but also to protect the use and possession of the property from arbitrary encroachment. The Court notes, the "prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history,

that we place on a person's right to enjoy what is his, free of governmental interference. Id. at 81, 32 L.Ed.2d at 570. The Court also discussed the fact that notice raises "no impenetrability barrier to the taking of property, but it can prevent unfair and mistaken deprivations, because fairness can rarely be obtained by secret, one-sided determinations of facts decisive of rights." Id. Notice is the best instrument for arriving at truth when a person faces serious loss and no later hearing and no damage award can undo a denial of due process in the first instance - As the Fuentes Court noted, the Supreme Court has never embraced the general proposition that a wrong may be done if it can be undone, thus notice was necessary prior to the seizure of

the property. This principle was reaffirmed in North Georgia Fishing, Inc. v. Di-Chem, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975).

In the instant matter, not only has a wrong been done by the entry of a default order and a substantial judgment, but apparently, this wrong cannot be undone. The present case gives this Court the opportunity to refine the due process doctrine that notice is necessary prior to the deprivation of property.

For the foregoing reasons the Petitioners ask the Court to grant the Court's Writ of Certiorari.

Respectfully submitted,

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Appendix

SUPREME COURT OF ILLINOIS

Robert H. Gillespy
Clerk

February 2, 1982

Mr. William J. Stevens
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Chicago, Illinois 60603-1299

No. 55835 - American Consulting Association, Inc., respondent, vs. James K. Spencer, indv., etc., et al., petitioners. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled case.

Very truly yours,

Clerk of the Supreme Court

NO. 80-1725

AMERICAN CONSULTING ASSOCIATION, INC.,	)	APPEAL FROM
	)	THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF
	)	COOK COUNTY
v.	)	
	)	
JAMES K. SPENCER, individually and d/b/a J & M DESIGN SERVICES, INC., XEROX CORPORATION, and CHARLENE SPENCER,	)	HONORABLE
	)	GEORGE A.
	)	HIGGINS
	)	PRESIDING
Defendants-Appellants.	)	

Mr. PRESIDING JUSTICE SULLIVAN delivered the opinion of the court:

In this appeal, defendants contended the granting of a motion to dismiss their petition to vacate a default judgment was error because (1) the judgment was void; and (2) their petition satisfied the requirements of section 72 of the Civil Practice Act.

Plaintiff's four-count complaint against defendants filed March 25, 1977,

alleged breach of contract, conspiracy, conversion, and intentional interference with plaintiff's prospective business advantage, and after defendants were served with process, James K. Spencer, individually and d/b/a J & M Design Co. (James Spencer) removed the case to the federal court where he filed motions for change of venue and to dismiss. On September 20, 1977, the case was remanded to he circuit court, following which, on October 3 and again on December 12, 1977, defendant J & M Design Services, Inc. and Charlene Spencer filed special appearances objecting to personal jurisdiction over them, and plaintiff responded to those motions. On November 12, 1977, James Spencer answered the complaint.

On March 30, 1978, there was a substitution of attorneys for defendants, and the hearing on the jurisdictional motion set for that day was reset for May 12 and then May 25, when an order was entered setting defendants' motion to dismiss and plaintiff's motion for fees for hearing on July 24, 1978--which also was the next scheduled date of the case. On July 18, 1978, defendants' substituted counsel gave notice by certified mail to defendants and to counsel for plaintiff that on July 24 they would present their motion to withdraw. This notice was received by J. Dwayne Wilcox, defendants' Texas attorney, on July 19, 1978, in Texas, where defendants reside. On July 24, 1978, an order drafted by defendants' counsel was entered which

(1) allowed their withdrawal; (2) found that the court had personal jurisdiction over J & M Design Services, Inc. and Charlene Spencer; (3) gave defendnts 45 days within which to obtain new counsel (4) stated that "[f]urther notice of these proceedings shall be served on Dwayne Wilcox" at his Texas address; (5) set the case for status report on September 7, 1978, without further notice; and (6) continued generally plaintiff's motion for attorney's fees.

On September 5, 1978, the status date was changed to September 22, 1978, without further notice. On that date, defendants were found to be in default for failure to appear or plead, and a prove-up of damages was set for November 1, 1978. The prove-up, after numerous continuances, was held between

July 3 and August 6, 1979, with judgment eventually entered on August 31, 1979 against all defendants[1/] for $175,000 with an additional $175,000 assessed as punitive damages.

On September 1, 1979, another judge was assigned the calendar which included the instant case. He held a status call of the cases on his calendar and, apparently unaware of the August 31 judgment, dismissed the case for want of prosecution on September 18, 1979. That order was vacated on plaintiff's motion on October 12, 1979. Prior thereto, on October 9, plaintiff served defendants

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1/ On January 19, 1979, the default order entered against Xerox Corporation (Xerox) was vacated, and it was given 30 days to answer or plead. The time was further extended on February 12, 1979, by stipulation. Xerox was subsequently dismissed without prejudice

with a petition to register the judgment in Texas, and defendants then moved here on October 25, 1979, to vacate the judgment. A motion to dismiss the petition to vacate was granted on May 30, 1980, and this appeal followed.

OPINION

Defendants initially contend the trial court should have granted their petition to vacate because the default judgment was void due to the lack of or defective notice as to proceedings before the default judgment. Generally, a judgment is void if the court lacks jurisdiction over the parties or subject matter (In re Application of County Collector (1968), 101 Ill.App.2d 1, 241 N.E.2d 641), if it was procured by fraud (Federal Sign & Signal Corp. v. Czubak (1978), 57 Ill.App.3d 176, 372 N.E.2d

965), or if the court lacks the inherent power to make or enter a particular order (Dils v. City of Chicago (1978), 62 Ill.App.3d 474, 378 N.E.2d 1130). While a void judgment may be attacked and vacated at any time either directly or collaterally (Fox v. Department of Revenue (1966), 34 Ill.2d 358, 215 N.E.2d 271), a judgment that is merely erroneous is not void and is not subject to collateral attack (Federal Sign and Signal Corp. v. Czubak).

In the present case, no challenge is made to the court's jurisdiction over the parties or subject matter, nor was a question raised as to the court's inherent authority to enter the default judgment, and defendants make no allegation and the record does not disclose that the judgment was procured

by fraud. Defendants suggest, however, that a judgment may also be void because of lack of or defective notice of proceedings prior to and including the judgment. We disagree. Initially, we note the three cases cited by defendants do not support their position. In Barthelemy v. Braun (1933), 272 Ill.App. 321, which predated section 72, there was not question as to notice. A default order was entered by the trial court before the date defendant was required to plead, and this was contrary to a rule of that court. An ex parte judgment was subsequently entered, and a motion to vacate filed by defendant two months later was denied. On appeal, the judgment was held to be invalid, with the court reasoning "that a plaintiff who proceeds contrary to the rule in

this respect must subsequently proceed at his peril and with the knowledge that any judgment based upon this premature order of default will be vacated and set aside upon review." (272 Ill.App. at 324.) In the other two cases cited by defendants, Andonoplas v. Jaremko (1972), 9 Ill.App.3d 298, 292 N.E.2d 225, and Public Taxi Service, Inc. v. Ayrton (1973), 15 Ill.App.3d 706, 304 N.E.2d 733, the trial courts in each case granted section 72 petitions to vacate default judgments. It was held on review in each case that the trial court lacked jurisdiction to vacate the judgment because the notice required by section 72 (see Supreme Court Rule 106 (Ill.Rev.Stat. 1977, ch. 110A, par. 106)) was not provided. A section 72 petition is not a continuation of the

original suit but is a separate, independent action, and a respondent named in the petition must be notified anew and, if proper notice is not given as provided by Supreme Court Rule 106, jurisdiction is lacking. (Silny v. Lorens (1979), 73 Ill.App.3d 638, 392 N.E.2d 267) It appears that the reviewing courts in both Andonoplas v. Jaremko and Public Taxi Service, Inc. v. Ayrton held in effect that just as service of summons gives the court jurisdiction over defendant in an original action, the notice required by section 72 is the jurisdictional nexus in a petition filed under that section.

In the case before us, the motions concerning which plaintiff contends there was lack of or defective notice predated the default judgment and raise

no jurisdictional questions. Moreover, it has been held that a defaulted party is not entitled to notice either of plaintiff's intention to move for default or its existence once granted (Illinois Marine Towing Corp. v. Black (1979), 74 Ill.App.3d 909, 393 N.E.2d 707; Limar-Pinehurst, Inc. v. Welter (1976), 38 Ill.App.3d 800, 350 N.E.2d 252), and that the failure to notify the defendant of a default judgment does not render it void (Ingram v. MFA Insurance Co. (1974), 18 Ill.App.3d 560, 309 N.E.2d 690). Accordingly, we reject plaintiff's contention that the default judgment was void.

Defendants also contend that the default judgment was, in fact, vacated by the subsequent dismissal for want of prosecution. Pointing out that this

dismissal on September 18, 1979 was within 30 days of the default judgment of August 1, 1979, they argue that it constituted a vacatur thereof under section 50(5) (Ill.Rev.Stat. 1979, ch. 110, par. 50(5)), which provides "[t]he court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." It is significant, however, that the order for dismissal for want of prosecution was apparently inadvertent, having occurred on a status call of all the cases on a calendar just assigned to the judge who entered the order. We think it clear that it resulted from the unfamiliarity of the

substituted judge with the case and that the dismissal was properly vacated on plaintiff's motion on October 12, 1979. Moreover, the unintended dismissal did not, in our view, amount to a setting aside of the default.

The dispositive question, therefore, is whether the trial court erred in granting plaintiff's motion to dismiss defendants' petition to vacate the default judgment. Thus, the question before us concerns only the sufficiency of that petition, which we must determine in accordance with the criteria established by statute and decisional law. Vacatur of such judgments may be obtained under section 72 of the Civil Practice Act (Ill.Rev.Stat. 1979, ch. 110, par. 72), which provides in relevant part:

"(1) Relief from final orders and judgments, may be had upon petition as provided in this Section. * * *

(2) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record."

The purpose of such a petition is to bring to the attention of the trial court any facts which, if known to it at the time judgment was entered, would have altered such judgment. (Illinois Marine Towing Corp. v. Black.) Proper grounds for relief under this section

exist when petitioner demonstrates (1) a meritorious defense, (2) due diligence in presenting the defense in the original action, (3) the trial court's misapprehension of the facts or a valid defense, through no fault or negligence of petitioner, when judgment was entered, and (4) due diligence in filing the relief petition. (Stallworth v. Thomas (1980), 83 Ill.App.3d 747, 404 N.E.2d 554.) In addition, petitioner must present supporting factual allegations justifying relief (Diacou v. Palos State Bank (1976), 65 Ill.2d 304, 357 N.E.2d 518), but such facts need only be sufficient to show entitlement to relief from the default rather than success in the underlying action (Reuben H. Donnelley Corp. v. Thomas (1979), 79 Ill.App.3d 726, 398 N.E.2d 972).

However, a petition which fails to show prima facie entitlement to relief is subject to a motion to dismiss. (Reich v. Breed (1979), 70 Ill.app.3d 838, 388 N.E.2d 994.) The decision to vacate rests within the sound discretion of the trial court (Harvey v. Harris Trust & Savings Bank (1979), 73 Ill.App.3d 280, 391 N.E.2d 461, cert. denied (1980), 445 U.S. 929) and will not be disturbed on review absent abuse of discretion (American Reserve Corp v. Holland (1980), 80 Ill.App.3d 638, 400 N.E.3d 102).

We find no such abuse of discretion here, as we believe that the criteria needed to demonstate the right to relief under section 72 were not satisfied. Defendnts are arguably correct, first of all, that they exercised due diligence

in presenting their petitio to vacate, as they did so within 20 days of plaintiff's filing of a petition to register the judgment in Texas; but while James Spencer may have presented a meritorious defense to the breach of contract count in his proposed amended answer in which he admitted the existence of the agreement but asserted breaches thereof by plaintiff, no such defense was presented in the original action and, in fact, he denied the existence of the agreement in his initial answer. Furthermore, he was presented no defense to the counts sounding in conspiracy conversion or intentional interference with plaintiff's prospective business advantage and, of course, the other defendants have presented no defense to any count.

Additionally, over 2-1/2 years elapsed from the time defendants were first served with process and more than one year after the withdrawal of their second counsel before they moved to vacate. In the interim, James Spencer sought removal to the federal district court; Charlene Spencer and J & M Design Services, Inc. challenged the trial court's exercise of personal jurisdiction; all defendants obtained the services of other attorneys; James Spencer filed an answer which admitted to a general denial; and defendants' second counsel withdrew. While such activity was minimal relative to the time that expired, we are struck by the absence of the assertion of a defense. In our view, the totality of the facts attest to the lack of due diligence on

the part of all defendants in asserting their defenses. See Illinois Marine Towing Co. v. Black; Lammert v. Lammert Industries, Inc. (1977), 46 Ill.app.3d 667, 360 N.E.2d 1355; Hogan & Farwell, Inc. v. Meitz (1976), 45 Ill.app.3d 216, 359 N.E.2d 740; cf. Steinberg's Department Store, Inc. v. Baysinger (1980), 86 Ill.App.3d 1140, 409 N.E.2d 8.

Similarly, defendants fail to show that through no fault or negligence of their own, error of fact or a valid defense was not presented to the trial court at the time the default judgment was entered. All parties have a general duty to follow the progress of their case (Esczuk v. Chicago Transit Authority (1968), 39 Ill.2d 464, 236 N.E.2d 719), and section 72 does not

afford a remedy to relieve a litigant of the consequences of his own mistakes or his counsel's negligence (DeMet v. DeMet (1979), 74 Ill.App.3d 680, 394 N.E.2d 3). Defendants' assertion that they were not notified of the proceedings is unavailing in light of their failure to present facts which would support a finding of reasonable mistake. The record contains no information that they contacted their second set of attorneys, plaintiff's attorney, or the court to ascertain the status of the case or that they attempted to appear at the July 24 hearing, hire other counsel when their attorneys withdrew on that date, obtain a copy of that July 24 order or any other order, or that they made any effort to follow the case at any time thereafter. Considering the course of

defendants' conduct, it seems clear that even if there was a failure to apprise the trial court of an error of fact or of a valid defense at the time judgment was entered, defendants were not free of fault or negligence in not bringing such matter to the court's attention. Accordingly, defendants cannot be relieved of the consequences of their own or their counsel's failure to follow the progress of the case.

Defendants correctly point out that where justice and fairness so require, a judgment may be vacated even though the requirement of due diligence has not been satisfied. (Reuben H. Donnelley Corp v. Thomas; Lutz v. Lutz (1977), 55 Ill.app.3d 967, 371 N.E.2d 348.) Thus, an expectation to the due diligence requirement is recognized when it is

clear from all the circumstances that a party has procured an unconscionable advantage through the extraordinary use of court proceses. (Norvell v. Howard (1979), 72 Ill.App.3d 698, 391 N.E.2d 101.) It also has been held that inadvertent failure to follow a case it not proper grounds for relief; but, rather, that some fraud or fundamental unfairness must be shown in order to invoke the court's equitable powers (Kohler v. Sears, Roebuck & Co. (1977), 56 Ill.app.3d 157, 371 N.E.2d 1044)). In our view, the conduct of plaintiff does not warrant the conclusion that court processes were used to gain an unconscionable advantage, nor does it suggest fraud or fundamental unfairness. Thus, we think it improper to relax the requirement of due diligence in the present case.

For the reasons stated, the judgment is affirmed.

Affirmed.

LORENZ and WILSON, JJ., concur.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, CHANCERY DIVISION

AMERICAN COUNSULTING ASSOCIATION, INC., Plaintiff,	)	
v.	)	No. 77 Ch 1938
JAMES K. SPENCER, individually and d/b/a J & M DESIGN CO., J & M DESIGN SERVICES, INC., XEROX CORPORATION and CHARLENE SPENCER, Defendants.	)	

ORDER

This matter having come upon the Court's set call for a hearing on the Plaintiff's Motion to Dismiss Petition to Vacate, which Petition to Vacate was previously filed on behalf of JAMES K. SPENCER, individually and d/b/a J & M

DESIGN CO., J & M DESIGN SERVICES, INC., a Texas corporation, and CHARLENE SPENCER, by virtue of a Judgment which was entered by the Honorable Francis T. Delaney on August 31 1979, against said Defendants, the parties being present in Court by their respective attorneys, the Court having considered the merits of Plaintiff's Motion to Dismiss Petition to Vacate, and the Court being otherwise fully advised in the premises

IT IS HEREBY ORDERED:

1. That Plaintiff's Motion to Dismiss Petition to Vacate is granted.

2. This Court expressly finds that there is no just cause to delay enforcement or appeal this Order.

May 30, 1980

ENTER:

/s/George Higgins
Judge